No. 22218

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT

v.

UNION BANK, A CORPORATION, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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v.

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

JURISDICTION

This case is before the Court upon an appeal from an order of the United States District Court for the Central District of California granting appellee's petition for

an order setting aside a Demand for Access to Evidence duly served by the Equal Employment Opportunity Commission 1/ upon appellee pursuant to the provisions of Section 709(b) and 710 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-8(b), 9) and the denial of the Commission's cross-petition for an order compelling appellee Union Bank (hereinafter designated as the employer or the bank) to comply with such demand. (C.A. 50-51) 2/

1/ Section 706(a) of Title VII (42 U.S.C. Sec. 2000e-5(a)) provides in relevant part, "Whenever it is charged in writing under oath by a person claiming to be aggrieved ...that an employer ... has engaged in an unlawful employment practice in the Commission shall furnish such employer ... with a copy of such charge and shall make an investigation of such charge ... If the Commission shall determine after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such unlawful employment practice ...

2/ References designated "C.A." are to pages of the transcript of the record in the court below reproduced as an appendix to this brief.

STATEMENT OF THE CASE

The charge in this case was filed on February 20, 1967, by Marguerite M. Buckley, pursuant to the provisions of Section 706(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(a)). Miss Buckley who had been employed as an attorney in the legal department of appellee charged that the bank had discriminated against her because of her sex, in violation of the provisions of Title VII of the Civil Rights Act of 1964. (C.A. 6). The charge was duly served upon the employer on March 8, 1967, and an investigation was undertaken by LeJean T. Clark in his capacity of Equal Employment Officer of the Equal Employment Opportunity Commission. (C.A. 35). During the course of the investigation, Mr. Clark asked for and received various kinds of documents needed for his investigation of the charge. (C.A. 35). Among the items requested by Mr. Clark was an IBM data process print-out, which listed the names, job code numbers, office or department and salaries of the bank's male and female employees. (C.A. 36). This was necessary to the investigation as it would provide an accurate comparison between the wage rates and positions of male and female employees, and shed light on conflicting assertions made by the charging party and the bank. (C.A. 36). Executive

Vice-President Ben J. Nachreiner, on March 8, 1967, showed Mr. Clark a sample print-out and agreed to furnish one for the Commission's examination (C.A. 35-36). The bank later refused to do so. (C.A. 10-11).

On March 31, 1967, Mr. Clark served a Demand for Access to Evidence upon the bank. The demand requested, inter alia (C.A. 8-9):

> 1. Personnel records, or data processed print-out sheets, listing names, sex, job title, job code numbers, office and/or department designation, and salaries for all positions in which men and women were employed by Union Bank in February, March, April, and December, 1966.

On April 20, 1967, the bank filed its petition to set aside the demand pursuant to the provisions of Section 710(b) of Title VII (42 U.S.C. Section 2000e-9(b)). (C.A. 2-5). On May 15, 1967, the Commission filed its response to the petition, praying the court to deny the bank's petition and order the bank to comply with the demand. (C.A. 33). On May 24, 1967, the district court issued its order setting aside the demand, on the ground that the IBM data process print-out (hereinafter "print-out") went "far beyond the

standards of relevance set by 42 U.S.C. §2000e-8(a)."

(C.A. 51). 3/

ARGUMENT

I. Under the standards normally applied to administrative agencies the information sought by the demand is "relevant" to the investigation of the charge filed with the Commission.

Section 709(a) (42 U.S.C. §2000e-8(a)) provides that

".... the Commission or its designated representatives shall at all reasonable times have access to, for purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to charges under investigation." (Emphasis supplied).

Prior to the instant proceeding there had been no specific judicial interpretation of the language of Section 709(a). There is, however, a wealth of authority dealing with the investigatory powers of administrative agencies. These

3/ It's undisputed that the print-out would provide data permitting a comparison between the positions and salaries of male and female employees.

authorities were ignored by the district court.

The broad legal principle to be applied to the investigative powers of an administrative agency is stated by Davis as follows: " .... recent cases permit such roving inquiries to whatever extent seems necessary to make the power of investigation effective." 1 Davis, Administrative Law 183. In the words of this Court, "The only limitation upon the scope of the Administrator's inquiry is that the records demanded be reasonable relevant to the matter in issue." 4/

The Supreme Court speaking to the issue in United States v. Morton Salt, 338 U. S. 632 (1950) stated, " .... it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." (supra at p.652).

In sum, "the test is relevance to the specific purpose, and the purpose is determined by the investigators." Davis, 1 Administrative Law, supra at pp 188-189.

The legislative history of Section 709 makes it completely clear that the scope of the Commission's investigatory

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4/ Detweiler v. Walling 157 F. 2d 841, 843 (C.A. 9, 1946), cert. denied 330 U. S. 819 (1947)

powers was to be as broad as those enjoyed by any administrative agency. In the House bill, Section 709 specifically referred to the range of investigatory powers vested in the Federal Trade Commission. 5/ (H.R. 7152 88th Cong. 110 Cong. Rec. 2709). When the House bill was sent to the Senate, Senator Dirksen raised questions concerning both the scope of the investigatory power incorporated in the House bill and the methods by which the investigatory power would be enforced by the Commission. These questions were answered by Senator Clark, one of the floor managers of the bill in the Senate. (88th Cong. Second Session, 110 Corg. Rec. 7216). In the leadership compromise which preceded Senate passage of the bill, Senator Dirksen offered and secured certain changes in language of the statute relating to Commission investigations. (88th Cong. Second Session, 110 Cong. Rec. 12819-20). However, these changes concerned only the method of enforcing the investigatory authority, and did not limit in any fashion the scope of the authority to investigate encompassed in the House bill. This fact was

5/ This Court in a leading decision construing the Federal Trade Commission Act concluded that the investigatory power of the Federal Trade Commission was very broad. Indeed, broad enough to reach "matters that might have been made the object of complaint." Hunt Foods v. FTC, 286 F. 2d 803, 809 (C.A. 9, 1961), cert. denied 365 U.S. 877

made uncontravertably clear by Senator Dirksen himself who, three days after the bill passed, introduced a comparison between the original House bill and the bill that was finally enacted as the Civil Rights Act of 1964. Commenting on Section 709 the comparative analysis states that the subpoena power accorded the Commission is the "Same, [as the House bill] although the manner of enforcing the subpoena is altered in form, but not in substance ..." (88th Cong. Second Session, Vol. 110 Cong. Rec. p. 16003)

> A. The information contained in the print-out is relevant for the purpose of determining whether there is reasonable cause to believe that the charging party was discriminated against because of her sex.

Contrary to the statement of the court below, the "existence or nonexistence of discrimination in other departments of the bank" is relevant to the question of discrimination among the professional personnel of the law division. (C.A. 51). This Court has often pointed out that an inference of discrimination may be "drawn from the totality of facts, the conglomerate of activities, and the entire web of circumstances presented by the evidence on the record as a whole." Aeronca Mfg. Co. v. NLRB, _____F.2d_____, decided Nov. 1, 1967, 66 LRRM 2574, 2576 (C.A. 9). Thus, this Court has

sustained Labor Board findings of discrimination in light of evidence concerning the employer's over all conduct. In NLRB v. West Coast Casket Co., this Court stated (205 F.2d 902, 907 (1953): 6/

> Smith's discharge should be viewed in the total context of respondent's conduct during the union campaign, which discloses anti-union sentiment expressed in part in a pattern of action which we have determined in the earlier portion of this opinion to involve unfair labor practices.

Discrimination on the basis of sex is by definition a class discrimination. Cf. Hall v. Werthan Bag Corp. 251 F. Supp. 184, 186 (U.S.D.C., M.D. Tenn., 1966). In this respect it is analogous to discrimination on the basis of union affiliation. Thus, evidence of the employer's "pattern of action," is plainly relevant to the Commission's determination of whether reasonable cause exists to believe that the employer discriminated against the charging party

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6/ Accord: NLRB v. Mrak Coal Co., 322 F. 2d. 311 (CA 9, 1963); Action Wholesale Inc. d/b/a/ A.L. French Co. 145 NLRB 627,628, 342 F.2d 814 (C.A. 9, 1965).

because of her sex. 7/

B. The information contained in the print-out is relevant for the purpose of framing an appropriate remedy in the event the Commission finds merit in the charge.

The print-out in addition to providing evidence relevant to the issue of whether the charging party was a victim of discrimination, would be crucial to the Commission in the carrying of its statutory duty to "endeavor to eliminate any such alleged unlawful employment practice...." 8/

As the court noted in Hall v. Werthan Bag, (supra, at 187-88,) the enforcement procedure of Section 706 contemplates that the Commission, in the public interest shall provide relief which goes beyond the limited interests of the charging party. In this respect, Section 706(a) retained its similarity to Section 10(c) (29 U.S.C. Sec. 160 (c)) of the Labor Act which formed the model for Title VII. Under

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7/ For example, the print-out could show that the wages paid male employees are always or almost always higher than those paid female employees holding the same job title or very similar jobs. Such information tends to support the inference that Miss Buckley was discriminatorily paid at a lower rate then male employees providing legal services for the bank. On the other hand, if a comparison between male and female rates for similar jobs showed no pattern of lower rates for female employees, such evidence would tend to support the bank's claim that Miss Buckley's problems flowed from her own deficiencies as an employee rather than from a practice of discrimination.

8/ Section 706 (a) of Title VII (42 U.S.C. 2000e-5(a)).

Section 10(c) the Labor Board is required to seek to eliminate the "practice" of discrimination. Looking then to a comparable case arising under the Labor Act, there being no judicial precedent under Title VII, we see that where a specific act of discrimination was committed pursuant to a general practice of discrimination the Labor Board has issued and obtained judicial enforcement of orders enjoining both the specific act of discrimination found and the practice from which it flowed. Thus, in NLRB v. Local Union No. 85, 274 F. 2d 344 (C.A. 5, 1960), cert. denied, 366 U.S. 908 (1961), the Labor Board found that an individual, one Gasaway, was discriminated against by being denied employment for failure to secure a union referral and that such discrimination occurred as result of discriminatory practices of the union and the employer. The Board's order required, inter alia, that the violator cease and desist from discriminating "against J.P. Gasaway, or any other employee or applicant for employment...". 274 F2d at p. 346.

An examination of conciliation agreements which have been entered into by the Equal Employment Opportunity Commission shows that, like orders of the Labor Board, they require the elimination of the practice of discrimination, where

such a practice exists, as well as providing specific relief for the charging parties. A conciliation agreement which was limited solely to providing relief for the charging party's specific complaint, assuming arguendo that the evidence before the Commission supports the allegation of discrimination, would be inconsistent with the requirements of Section 706(a).

In sum, in order for the Commission to effectively carry out its statutory function of endeavoring to eliminate discriminatory practices it is imperative that the Commission have knowledge of the bank's employment practices as regards its female employees. The print-out sought by the demand will provide information relevant to the purpose of framing a remedy should a violation be found, and thus is clearly within the ambit of the Commission's investigatory powers as set forth in Section 709(a) of Title VII. 9/

9/ In those cases where conciliation fails and litigation ensues under Section 706(e), the complaints filed have normally been cast as class actions. See, e.g. Hall v. Werthan Bag, supra; Anthony v. Brooks 65 LRRM 3074 (U.S. D.C. Ga., June 9, 1967); Moody v. Albemarle Paper Co., 271 F. Supp. 27 (U.S.D.C., E.D. N.C., 1967); Robinson v. Lorillard Co., No. c-141-G-66 (U.S.D.C., M.D., N.C., Jan 26, 1967); Quarles v. Phillip Morris Inc., No. 4544 (U.S.D.C. E.D. Va., Sept. 26, 1966). In such cases evidence bearing upon the employer's practices vis a vis the class would plainly be relevant to the proceeding. It would be anamolous, indeed, if the district courts which like the Commission have the authority to remedy a "practice" of discrimination, were able to accept as relevant, evidence, which for purposes of the proceeding before the Commission, would be deemed not relevant.

II. The "print-out" is relevant to resolving the conflict between the charging party's claim that female employees were discriminated against in upgrading because of their sex and the bank's denial of that claim.

The charge filed in this case alleges inter alia that the respondent employer discriminated against female employees "in upgrading on the job; men doing the same job had corporate titles and higher salaries." (C.A. 34). While the balance of the charging party's statement concerns the discrimination which she suffered it is clear that the charge encompasses an alleged general practice of denial of equal opportunity to female employees. This is made all the more apparent by the charging party's letter to the Commission of March 29, 1967, wherein the charging party states, "The aforementioned Complaint was filed because of the practices of the Bank toward women in the bank generally as well as my own problems with it .... It's my impression that a check of the bank records would reveal salary discrepancies and further reveal that most women who have been promoted were on the job for lengthier periods of time than men who were doing the same jobs and received similar promotions." (C.A. 34). In short, the charge alleges a specific instance

of discrimination which flowed from a pattern of general discrimination on the basis of sex. The bank specifically denies any discrimination. (C.A. 15) And while the bank does not contradict the charging party's claim that male employees with less experience than the charging party were given higher salaries and higher titles, the bank appears to be saying that this was due to deficiencies in the charging party rather than any pattern of discrimination against females (C.A. 13-14, 32)

Thus, a key point in dispute is whether the bank pays female employees lower salaries and accords them lesser titles for performing comparable work. The bank, by its own response to the charge, has raised this as an issue in the case. The data contained in the print-out relates directly to this issue and is therefore relevant evidence because of "its legitimate tendency to establish a converted fact." I.C.C. v. Baird 194 U.S. 25, 44 (1903).

CONCLUSION

The print-out sought by the demand and refused by the bank is subject to examination and copying by the Commission

under the provisions of Section 709 and 710 of Title VII because:

1. the print-out is relevant to the investigation under the general standards of relevancy applicable to the investigatory powers of administrative agencies and, as shown by the legislative history of the title clearly within the ambit of the investigatory powers vested in the Commission by Congress
2. the data contained in the print-out may reveal a general pattern of discrimination on the basis of sex, which may be utilized as part of the whole record tending to support an inference of discrimination with respect to the instant charge
3. if the Commission concludes that there is merit to the charge, such data relating to the employer's practices would be critical to the framing of an appropriate remedy and
4. the data contained in the print-out bears directly upon matters in controversy in the case. Accordingly, the Commission submits that the court below erred in granting the bank's petition to set aside the demand and denying the Commission's cross petition for enforcement thereof. The Commission respectfully

prays this Court to issue an order setting aside the order of the court below and remand the case to the district court with instructions to issue an order compelling the bank to comply with the demand.

Respectfully submitted,

_____

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December, 1967

STATUTORY APPENDIX

The relevant provisions of Title VII of the Civil Rights Act of 1964, (78 Stat. 253, 42 U.S.C. 2000e, et seq.) are as follows:

Prevention of Unlawful Employment Practices

Section 706(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

.....

Section 706(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the

Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

.....

Section 709(a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated, or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

.....

Section 710(a) For the purposes of any investigation of a charge filed under the authority contained in section 706, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

.....

The relevant provisions of the National Labor Relations

Act, as amended (61 Stat. 136, 73Stat. 519, 29 U.S.C. Sec.

151, et seq.) are as follows:

.....

Section 10(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and disist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: ....

.....

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Russell Specter,
Senior Attorney,
Equal Employment Opportunity Commission

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The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Russell Specter,
Senior Attorney,
Equal Employment Opportunity Commission

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief for the Equal Employment Opportunity Commission have been served by official United States Airmail, postage prepaid, upon counsel for appellee addressed as follows:

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